No. 00-1363

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

CREIGHTON E. MILLER, Administrator of the Estate of Jabe J. Fincher, Sr., Deceased,

Petitioner,

v.

AMERADA HESS CORPORATION; AMOCO CORPORATION; ASHLAND OIL, INC.; ATLANTIC RICHFIELD COMPANY; CROWN CENTRAL PETROLEUM CORPORATION; EXXON CORPORATION; GULF OIL CORPORATION; HESS OIL VIRGIN ISLANDS CORPORATION; MARATHON OIL COMPANY; MONSANTO COMPANY; SHELL OIL COMPANY; SINCLAIR REFINING COMPANY; STANDARD OIL COMPANY; STANDARD OIL COMPANY OF INDIANA; SUN COMPANY, INC. (R&M); TEXACO, INC.; UNION CARBIDE CORP.; KEYSTONE TANKSHIP CORP.; MARINE TRANSPORT LINES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

GEORGE M. WALKER
Counsel of Record
Attorney for Respondents

HAND ARENDALL, L.L.C.
Post Office Box 123
Mobile, Alabama 36601
Phone: (334) 432-5511

LOUIS C. WOOLF
Attorney for Respondents

WOOLF, MCLANE, BRIGHT, ALLEN & CARPENTER
Post Office Box 900
Knoxville, Tennessee 37901-0900
Phone: (615) 215-1000

Respondents:
Amerada Hess Corporation; Atlantic Richfield Company; Ashland Oil, Inc.; Amoco Corporation; Crown Central Petroleum Corporation; Exxon Corporation; Gulf Oil Corporation; Hess Oil Virgin Islands Corporation; Marathon Oil Company; Monsanto Company; Shell Oil Company; Sun Company, Inc. (R&M); Texaco, Inc.; Union Carbide Corporation

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REASONS FOR DENYING THE WRIT

Petitioner seeks review of a claimed constitutional error that was never presented to or argued in the courts below. In essence, Petitioner seeks review of the Supreme Court of Alabama's dismissal of his appeal by asserting, for the first time here, that his federal rights were implicated. However, the Supreme Court of Alabama dismissed the underlying appeal based upon Alabama procedure and based upon Alabama case law, and there were no federal constitutional rights implicated or affected. Petitioner's effort to invoke the jurisdiction of this Court is misguided and, indeed, the petition should be denied for want of certiorari jurisdiction under 28 U.S.C. § 1257.

I. PETITIONER HAS NOT IDENTIFIED ANY COMPELLING REASON FOR THIS COURT TO EXERCISE ITS DISCRETION TO REVIEW THIS CASE.

Petitioner has failed to state or identify a compelling reason for granting this writ of certiorari, as required by Supreme Court Rule 10. Moreover, Petitioner has made no showing that the decision of the Supreme Court of Alabama decided an important federal question in a way that conflicts with the decision of another state court of last resort, or of a United States Court of Appeals, or of this Court. To the contrary, the federal questions as to which Petitioner seeks review in this Court were never presented to the Supreme Court of Alabama. At best, Petitioner argues that there was a misapplication of a properly stated rule of law, the very type of review

"rarely granted" under the strictures of Supreme Court Rule 10.

II. PETITIONER FAILED TO PRESERVE THE FEDERAL QUESTIONS PRESENTED IN HIS PETITION, THEREBY DEPRIVING THIS COURT OF JURISDICTION IN THIS CASE.

This Court does not generally consider federal claims in reviewing state court judgments where the federal claims were not presented to and considered by the state court. Most recently, in *Adams v. Robertson*, 520 U.S. 83 (1997), the Court stated:

> With "very rare exceptions" . . . we have adhered to the rule in reviewing state-court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.

Id. at 86 (citation omitted).

Adams is simply the latest in the long line of cases in which this Court has refused to entertain federal claims not raised until presented to this Court. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985) ("Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the state court . . . the long-standing rule that this Court will not consider such claims creates, at the least, a weighty presumption against review."); *Webb v. Webb*, 451 U.S. 493, 496-97 (1981) ("It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state

court can arise only if the record as a whole shows either expressly or by implication that the federal claim was adequately presented in the state system."); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions."); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945) ("Since the [State] Supreme Court did not pass on the question, we may not do so."); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) ("[D]ue regard for the appropriate relationship of this Court to state courts requires us to decline to consider questions affecting the validity of state statutes not urged or considered there.").

It is undisputed that Petitioner did not present either his due process claim or his equal protection claim in the Supreme Court of Alabama or in the circuit court there, and that he thereby failed to preserve any federal question for review by this Court. For this reason, the Petition for Writ of Certiorari should be denied.

III. PETITIONER HAD SEVERAL OPPORTUNITIES TO PRESENT HIS FEDERAL CLAIMS IN THE STATE COURTS, YET HE FAILED TO DO SO.

Petitioner cites an Ohio appellate court decision for the proposition that he had "no reason to raise the dispute to a constitutional level until the Alabama Supreme Court interpreted and applied its rule of civil procedure in such a way as to deny Fincher due process." (Pet., p. 8,

n. 8). This facile and disingenuous argument ignores Petitioner's responsibility under long-standing law in this Court to present federal questions in the first instance to the state courts, and it seeks to excuse conduct that is procedurally inexcusable.

There were at least three different occasions when Petitioner could have presented his federal claims to the state courts:

1. Motion to Extend Time to File Appeal as of Right. (Pet. App. 65-65). When Petitioner asked the circuit court to extend the time for his appeal due to his failure to receive a copy of the judgment from the clerk, he could have – and should have – asserted that the strict enforcement of the 42 day appeal period would violate his due process and equal protection rights. He did not do so.

2. Brief in Opposition to Motion to Dismiss the Appeal. (Pet., App. 91-115). When Petitioner filed his brief in opposition to Respondents' Motion to Dismiss the Appeal in the Supreme Court of Alabama, he could have – and should have – asserted that dismissal of the appeal would violate his equal protection or due process rights under the United States Constitution. If he had raised this issue then, the Supreme Court of Alabama could have addressed it. But he did not do so.

3. In an application for rehearing in the Supreme Court of Alabama. Under Rule 40 of the Alabama Rules of Appellate Procedure, Petitioner was entitled to file an application for rehearing in the Supreme Court of Alabama, in which he could have – and should have – asserted that dismissal of the appeal violated his due process and equal protection rights under the United

States Constitution. He did not file an application for rehearing. It is quite disingenuous for Petitioner to assert that his due process rights were violated when he failed to take advantage of the process that was available to him.

In this regard, the Petition here fails to comply with Supreme Court Rule 14.1(g)(i), inasmuch as it fails to identify "when the federal questions sought to be reviewed were raised" or "the method or manner of raising them and the way in which they were passed on by the court." *Id.* While Petitioner purports to comply with the rule at pages 9-12 of the Petition, it is clear that he can point to nothing in the record evidencing that any federal question was ever raised or passed upon in the state courts. Under the circumstances, there is nothing in the Petition "to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on writ of certiorari." *Id.*

IV. THE FEDERAL QUESTIONS PRESENTED ARE NOT SUBSTANTIAL OR MERITORIOUS.

Even if the federal questions for which review is sought had properly been presented below and preserved, this Court should nevertheless refuse review because the questions are not substantial or meritorious. Petitioner lost his right to appeal from a state court civil judgment, but he lost that right not simply because his lawyer did not receive a copy of the written judgment within the period of time permitted for perfection of an appeal. The trial court in open court and with all counsel present, granted the respondents' Motion for Summary

Judgment from the bench. Moreover, the trial court in open court signed the Order prepared by Respondents' counsel granting summary judgment. Therefore, the suggestion that Petitioner's counsel was not aware of the grant of summary judgment until November 10, 1999, is simply incorrect. The judgment was recorded on the court's docket sheet, but Petitioner's counsel never reviewed that despite his knowledge that a ruling was imminent. The entry of the order was known to the staff of the Judge who entered the judgment, but Petitioner's counsel never inquired there either, despite knowing that a ruling was imminent. Finally, the entry of judgment was known to Respondents' counsel, yet Petitioner's counsel never inquired of him either, despite knowing that a ruling was imminent. Petitioner's argument that he was not afforded constitutional notice is meritless, inasmuch as his counsel failed to follow up on the results of the summary judgment hearing.

Alabama has adopted a rule of civil procedure that does not permit a party to claim a failure of service by a clerk of an order or a judgment as a basis for failure to file a timely appeal, unless the party also demonstrates excusable neglect. Alabama Rule of Civil Procedure 77(d); *see also Bacon v. Winn-Dixie Montgomery, Inc.*, 730 So. 2d 600, 602 (Ala. 1998). Petitioner was unable to demonstrate excusable neglect to the satisfaction of the Supreme Court of Alabama. (Pet., App. 9). Clearly, Petitioner was afforded all of his rights under the procedures adopted by Alabama for litigation of civil actions in its courts, and was not subjected to any meaningful constitutional violation.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

GEORGE M. WALKER
Counsel of Record
HAND ARENDALL, L.L.C.
Post Office Box 123
Mobile, Alabama 36601
Phone: (334) 432-5511

LOUIS C. WOOLF
WOOLF, MCLANE, BRIGHT,
ALLEN & CARPENTER
Post Office Box 900
Knoxville, Tennessee 37901-0900
Phone: (615) 215-1000

Attorneys for Respondents
Amerada Hess Corporation
Atlantic Richfield Company
Ashland Oil, Inc.
Amoco Corporation
Crown Central Petroleum Corporation
Exxon Corporation
Gulf Oil Corporation
Hess Oil Virgin Islands Corporation
Marathon Oil Company
Monsanto Company
Shell Oil Company
Sun Company, Inc. (R&M)
Texaco, Inc.
Union Carbide Corporation